FILED
JAN 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTEREST OF)
MARION LAMONT HARKERT,)
A Child.)

Filed January 31, 1978

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2-60574

Appeal from Polk District Court - Don L. Tidrick, Judge.

Appeal by juvenile from finding of delinquency based on operating a motor vehicle without the owner's consent alleging insufficient evidence to prove commission of the crime beyond a reasonable doubt. - Reversed.

Robert J. Rhudy, Des Moines, for Appellant.

Richard C. Turner, Assistant Attorney General, Stephen C. Robinson, Special Assistant Attorney General and George Cosson, Assistant Attorney General, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Appellant Marion Lamont Harkert appeals an adverse adjudicatory order finding him a delinquent child pursuant to § 232.2(12)(a), The Code. A petition was filed alleging Harkert operated a motor vehicle without the owner's consent in violation of § 321.76, The Code. At the conclusion of the State's evidence and at the conclusion of all evidence, Harkert's counsel moved for a directed verdict on the grounds the State failed to establish all the elements of the offense. Counsel argued the evidence indicated Harkert had neither taken nor operated the vehicle. The State resisted arguing the juvenile was liable as an accessory. Section 688.1, The Code. The court overruled Harkert's motions, finding the juvenile had supported and encouraged the taking of the car and was therefore guilty as an accessory even though someone else did the actual taking and driving.

Our review is de novo. Interest of Thompson, 241 N.W.2d 2, 4 (Iowa 1976); In Interest of Meek, 236 N.W.2d 284, 289 (Iowa 1975); § 232.58, The Code. However, we do give weight to the trial court's findings, but are not bound by them. **Meek**, supra; rule 14(f)(7), Rules of Appellate Procedure.

The issue presented on appeal is whether the juvenile court, as a matter of law, erred in finding Harkert delinquent by reason of violating § 321.76. Specifically, Harkert alleges the State failed to prove each element of the offense upon which the delinquency was charged, beyond a reasonable doubt. The elements of operating a motor vehicle without consent in violation of § 321.76 are found in State v. Rosewall, 239 N.W.2d 171 (Iowa 1976) and In re Champion, 221 N.W.2d 773 (Iowa 1974). Harkert contends there is no evidence that he was involved in the original taking or that he ever drove the automobile himself.

When a delinquency charge, as here, is based upon an alleged public offense, due process requires that proof be beyond a reasonable doubt. **Thompson**, supra. See also In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Direct evidence is not necessary to prove the commission by defendant of the crime charged. It may be proved by circumstantial evidence alone, but the facts proved must be consistent not only with the guilt of the accused but they must also be inconsistent with any

rational theory of defendant's innocence. State v. Ampey, 210 N.W.2d 433, 434 (Iowa 1973).

Moreover, one cannot be convicted of a crime upon a theory of aiding and abetting unless there is sufficient evidence to show he assented to or lent countenance and approval to the criminal act. State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972). Mere physical presence at the scene of the crime does not prove aiding and abetting. **Barnes**, supra. However, a defendant's participation as an aiding and abetting accomplice may be proved by circumstantial evidence. Circumstances which may be considered include those surrounding the act and defendant's subsequent conduct. **State v. Barnes**, supra at 828.

From a review of the evidence, we find there is insufficient evidence to establish Harkert's participation in the offense charged. At the hearing Harkert testified he and two other youths were walking to a pool parlor. One of the other youths testified that the three had talked about taking the car but that Harkert and the other juvenile had continued on to the pool hall. Later he stated that Harkert had not encouraged him to take the car in any way. The court found that Demery Butts took the car and was the only one of the three juveniles to drive it. Demery encouraged Harkert and the other juvenile to get in the car.

The evidence places Harkert at the scene of the crime after the actual taking. However, Harkert never in fact drove the car. Although he fabricated a story about a boy named Jeff who supposedly picked up the other three youths and was taking them home when the police began to pursue the car, this is not inconsistent with any rational hypothesis of his innocence of the crime charged. The State failed to prove Harkert's participation beyond a reasonable doubt.

REVERSED.